IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 310 of 2003
In
COMPANY PETITION No. 126 of 1990
With
COMPANY APPLICATION No. 355 of 2003
In
COMPANY PETITION No. 126 of 1990

For Approval and Signature:
***HONOURABLE* MS. JUSTICE R.M.DOSHIT**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to civil judge ?

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FAROKH S. TODYWALLA - Applicant(s)

Versus

O.L. OF VITTA MAZDA LTD. - Respondent(s)

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Appearance :
MR RE VARIAVA for Applicant(s) : 1,
MR RM DESAI for Respondent(s) : 1,
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CORAM : *HONOURABLE MS. JUSTICE R.M.DOSHIT*

Date : 14/06/2005

ORAL JUDGMENT

These two Applications raise identical issues. The matters are, therefore, decided together by this Common Judgment.

These Judges' Summons have been taken out by the purchasers of the parcels of land, of land bearing Survey No. 78 of Village-Kathiria purchased by the concerned applicant from Messrs. Vitta Mazda Limited, a company now in the process of winding up [hereinafter referred to as, "***the Company***"] for validation of the said transfer of lands under Section 536 (2) of the Companies Act, 1956 [hereinafter referred to as, "***the Act***"].

The Company was incorporated on 24th August, 1985 for the main objects amongst others to deal in lands, erect buildings thereupon and/or to sell lands by developing it. Company Petition No. 126 of 1990 was presented in this Court on 14th August, 1990 seeking order of winding up of the Company. One more petition, being Company Petition No. 212 of 1996 was also presented in this Court seeking winding up of the Company. The said petitions were admitted by the learned Company Judge on 10th October, 1990 and 4th September, 1996 respectively. The admission of the Company Petition was advertised in newspapers on 28th September, 1997. By common order dated 27th August, 1998 made on the above-referred two Company

Petitions, the Company has been ordered to be wound up. Since the said order, the Official Liquidator, appointed to be the Liquidator of the Company, has taken over possession of the assets of the Company, including the above referred land Survey No. 78 of village Kathiria. The Official Liquidator advertised the said parcels of land for their disposal.

Pending the winding up petitions, the applicant in Company Application No. 310 of 2003 ***purchased parcels of land bearing Plot Nos. 78/5, 78/6, 78/182 & 78/183 of the land Survey No. 78 by registered sale deeds dated 28th December, 1993 and 14th June, 1994***. The applicants in Company Application NO. 355 of 2003 purchased the parcel of land bearing plot No. 23, admeasuring 393.14 sq. meters of the said land Survey No. 78 by a registered Sale Deed dated 22nd June, 1992. Pursuant to the order of winding up of the petition and taking over of possession of the assets of the Company by the Official Liquidator, the applicants have taken out these Judges' Summons for validation of the above referred disposition of the parcels of land made on 28th December, 1993 and 22nd June, 1992 respectively.

Mr. Kavina has submitted that the Company was engaged in the business of buying, developing and selling the lands. The land, Survey No. 78 was, therefore, the stock-in-trade of the Company. The disposition of any stock-in-trade pending winding up necessarily calls for validation by this Court. He has submitted that the sale of the concerned parcels of land was in due course of business of the Company. The Company had been paid the consideration thereof at the prevalent market rate. He has submitted that the applicants were the *bona fide* purchasers who purchased the parcels of land for consideration without the knowledge of the pending winding up petition. He has also submitted that the transactions in question were not entered with a view to defrauding the creditors of the Company or with a view to selecting some of the creditors for preferential discharge or for preferring some of the creditors. He has relied upon the statements made in the affidavits made in support of the Judges Summons, the balance sheet of the Company, the accounts of the concerned applicant to prove that the consideration money was indeed paid to the Company. He has submitted that since the purchase of the concerned

parcels of land, both the applicants have raised construction over the said parcels of land and ever since are in possession of the concerned parcels of land. The applicants, therefore, objected to the Official Liquidator's taking over possession of the said parcels of land, as on the date of the order of winding up of the Company was not the owner of the said parcels of land. He has submitted that the Official Liquidator had no authority to take over the possession of the concerned parcels of land or to dispose of the same as the assets of the Company. He has submitted that it is the normal rule of law that the *bona fide* transactions entered by a company in winding up in due course of its business be validated. He has submitted that the disposition of the assets of a company pending winding up petition, if made by such company with *bona fide* intention to keep the company going, such transactions shall be validated by the Court as envisaged by Section 536 (2) of the Act. He has also submitted that one of the objections raised by the Official Liquidator is with respect to the attachment of the concerned parcels of land by the Tax Recovery Officer under the Income tax Act. He has submitted that the attachment of the

land by the Tax Recovery Officer shall not preclude this Court from validating the said transactions in exercise of powers conferred by Section 536 (2) of the Act. In support of his contentions Mr. Kavina has relied upon the judgments in the matters of *Re* : ***Park Ward & Company Limited*** [261 Chancery Dvn. 828]; ***Tulsidas Jasraj Parekh v. The Industrial Development Bank of Western India*** [32 BLR 953]; ***J. Sen Gupta Private Limited*** (***In Liquidation***) [AIR 1962 p-405]; of ***S.P Khanna vs. S.N Ghosh*** [1976 TLR 1740]; in *Re* : ***T.W Construction Limited*** [24 Company Cases 180]; of ***Bank of Tokyo-Mitsubishi Limited v. Essar Steel Limited*** [104 Company Cases 361].

The Applications are contested by the Official Liquidator represented by Mr. Desai. Mr. Desai has submitted that in disposing of the lands, the lack of *bona fide* is explicit. He has submitted that the consideration money has not been received by the Company. In absence of any consideration paid to the Company, the lack of *bona fide* is established. Such disposition of the assets of the company should not be approved by this Court. He has also submitted that the concerned parcels of land were under attachment

by the Income Tax Department. The Company, therefore, had no authority to transfer the said parcels of land. The said parcels of land were transferred evidently to defraud the Revenue as well as the creditors of the Company. In support of his contention Mr. Desai has relied upon the judgments in the matters of ***Rushvi Estate & Investments Pvt. Limited vs. Official Liquidator of Shri Ambica Mills Limited*** [105 Company Cases 828]; and ***Kailash Nath Bajpai & Ors. vs. Hind Housing & Construction Limited & Ors.*** [2001 Company Law Cases 656]. He has also relied upon the orders made on Company Application No. 291 of 1999 and Company Application No. 213 of 2000. He has read over the report of the Official Liquidator.

The Secured Creditors of the Company have been impleaded as party opponents. Nevertheless, they have not contested the Applications.

In the aforesaid Company Application No. 291 of 1999, the applicant had purchased certain plots of land of the aforesaid land Survey No. 78 from vendees of the Company. The Company had sold the said plots of land to its vendees by registered sale deeds. The

said vendees had sold the said plots of land to the applicant by registered sale deeds. The said transactions took place pending the winding up petition before this Court. The said applicant, therefore, took out the motion for validation of the said transactions under Section 536 (2) of the Act. The learned Company Judge did not accept that the said transactions were not fraudulent or were not made in order to give preference to any creditor. The learned Company Judge held that, "***the transaction is not a bona fide transaction and does not warrant an approval being granted under Section 536 (2).***" In the aforesaid Company Application No. 213 of 2000, the applicant sought direction to the Official Liquidator to sign the documents of sale deeds of the plots nos. 13 & 23 of the aforesaid land Survey No. 78. It was the case of the said applicant that the Company had agreed to sale the said plots of land to the said applicant. The applicant had paid money to the Company in full in cash. It should be noted that in that case there was not a completed sale made in favour of the applicant. Besides, the learned Company Judge was also pleased to hold that the payment alleged to be made in cash was doubtful and the

transaction was not *bona fide*.

In the matters relied upon by Mr. Kavina, the disposition of the assets of the company in winding up was held to be *bona fide* made with a view to keeping the company going and to meet its expenses. In the matters relied upon by Mr. Desai, the disposition in question of the assets of the company in winding up was not approved by the Court. Such disposition was not held to have been made in the interest of the company with a view to meeting the necessities of the company or for the benefit of its creditors. However, the Courts are at idem with respect to the principle underlying the provisions contained in Section 536 (2) of the Act and the principles that govern the Courts' *jurisdiction* under Section 536 (2) of the Act. It is consistently held that, ***"Section 536 (2) of the Act is a wholesome provision enacted with a view to preventing improper disposition or dissipation of the property of a company so as to affect the assets otherwise available for distribution amongst the creditors of the company in winding up."***

Section 536 (2) of the Act confers absolute discretion upon a court whether or not to validate disposition of the assets of the Company since the commencement of the winding up process. Exercise of such discretion is controlled by the general principles that apply to exercise of judicial discretion by the courts of law. Such exercise shall depend upon the surrounding circumstances in which the transaction was effected. In cases where such disposition is made virtually with a view to defrauding the revenue or the creditors or to prefer one or the other creditor in contravention of the principle of *pari passu* distribution of the assets of the company amongst all its creditors the Courts have invariably refused to validate such transactions. The court should, therefore, examine the surrounding circumstances in which disposition of the assets of the company was made.

24.11.2005

In the present matters, the applicants in both these Applications have purchased the concerned parcels of land Survey No. 78 by registered sale deed. It is the case of the applicant in Company

Application No. 310 of 2003 that he had paid the sale consideration in full in cash. The said payment is evidenced by the recitals in the sale document and the possession of the concerned parcels of land also was handed over to the said applicant. It is stated that the aforesaid land Survey No. 78 admeasuring 187700 sq.m situated in the Union Territory of Daman was purchased by the Company by registered sale deed dated 5th September, 1990. Since then, the company developed the said land Survey No. 78 into 291 plots. Some of the said plots were sold to the respective purchasers. It has been stated that the said applicant had purchased the concerned parcels of land from one Shri Dhara Debu, one of the Directors of the Company, and that the said Shri Dhara Debu was authorized by the Board of Directors of the Company to enter into the said sale transaction for and on behalf of the Company. The aforesaid statements made on oath are not controverted by the Official Liquidator. Thus, it is apparent that the said land Survey No. 78 was purchased by the Company, was developed and parcels of lands were disposed of by the Company in course of its business. If there were any intention to defraud the creditors of the

company, or to prefer any particular creditor/s, the same has not been established on the record of the matter. It is not the case of the Official Liquidator that the aforesaid applicant was one of the creditors of the Company or that he had not paid the sale consideration to the Company. Though the Official Liquidator has emphatically denied that the Company had received the sale consideration, the said denial is not supported by evidence on record. The said denial is based on the presumption as the Official Liquidator, according to him, has not been able to locate or inspect the accounts of the Company. It should be noted that pending winding up process the assets of a company are in *custodia legis*. The liquidator is allowed to take possession of the assets, to dispose of the assets, to recover the sale proceeds and to distribute the same amongst the creditors, on behalf of the Company Court. It is thus the duty of the liquidator to assist the Court in the winding up process of a company. In the present case, however, the Official Liquidator appears to have failed in his duty to inspect the record of the Company and to bring the true facts afore. Instead of examining the accounts of the Company or any other

record, an objection has been raised that the Company did not receive the sale consideration because the accounts are not traceable. Such objections are not expected of the Official Liquidator unless he verifies the record and makes a definite finding that the money in question was not received by the Company. Assuming that the Official Liquidator could not trace the records of the Company, he could have verified whether or not such amounts were received by the Company from its bank accounts. It is sad that the Official Liquidator has failed to do so. Had the Official Liquidator taken such preliminary measures quite a few litigations could have been avoided. In my view, the objection raised by the Official Liquidator without recourse to the record need not be countenanced. The Official Liquidator has not brought on the record that the said applicant had been favoured by the Company in any manner.

The applicants in Company Application No. 355 of 2003 have stated that they had purchased the concerned plots of land Survey No. 78 by registered sale deeds dated 22nd June, 1992 and 2nd August, 1993. The sale consideration in the sum of Rs. 1,13,500/=

was paid to the Company by two separate demand drafts. Since then, the said applicants have raised construction on the concerned plots. The applicants had obtained requisite permission for construction from the local authority. These facts also are not controverted by the Official Liquidator. As in the other case here also the objection is based on a presumption as, according to the Official Liquidator, the accounts and the records of the Company are not traceable.

As to the objection raised on the ground that on the relevant date, the concerned parcels of land were under attachment by the Tax Recovery Officer, the same is not sustainable. Section 281 of the Income tax Act, 1961 provides, *inter alia,* that the transfer made pending proceeding under the said Act, "***shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceeding or otherwise***." Thus, if at all the disposition of the concerned parcels of land were void for the purpose of Income tax Act, for the said parcels of land were under attachment by the Tax Recovery Officer, that

should be so with respect to any tax or any other sum payable under the said Act and shall not govern the effect of the winding up of the company under the Act.

As discussed hereinabove, the disposition of the concerned parcels of land in favour of the respective applicants after commencement of the winding up process as envisaged by Section 441 (2) of the Act requires to be upheld in exercise of powers conferred by sub-section 2 of Section 536 of the Act. Accordingly, disposition of the concerned parcels of land in favour of the applicants herein stands confirmed.

Both these Applications stand disposed of in the above terms. It is clarified that this judgment shall not affect any liability incurred by the applicants under the Income tax Act, 1961.

Registry shall maintain copy of this judgment in each Application.

Sd/=

{Miss R.M Doshit, J.}

*Prakash**

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NB :- Words, “***purchased parcels of land bearing Plot Nos. 78/5, 78/6, 78/182 & 78/183 of the land Survey No. 78 by registered sale deeds dated 28th December, 1993 and 14th June, 1994”*** appearing on page 3 of the judgment are substituted for the words, “purchased a parcel of land bearing plot No. 19 admeasuring 393.14 sq. meters of the land bearing Survey No. 78 by a registered sale deed dated 28th December, 1993” by Order dated 29th December, 2005 made on the ***Note for Speaking to Minutes***.

29th December, 2005 {Miss R.M Doshit, J.}

*Prakash**